



POLICE DEPARTMENT

March 30, 2015

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Frank Desiderato
Tax Registry No. 936473
120 Precinct
Disciplinary Case No. 2014-11948

The above-named member of the Department appeared before me on January 6, 2015, charged with the following:

1. Said Police Officer Frank Desiderato, on or about September 18, 2013, at approximately 1520 hours, while assigned to 120th Precinct and on duty, in the vicinity of Bay Street and Clinton Street, Richmond County, did wrongfully use force against Person A in that he slammed Person A's head against a vehicle without police necessity. (*As amended*) P.G. 203-11 – USE OF FORCE

The Civilian Complaint Review Board (CCRB) was represented by Carrie Eicholtz, Esq. Respondent was represented by John P. Tynan, Esq. Respondent through his counsel, entered a plea of Not Guilty to the subject charge. The CCRB did not call any witnesses; instead, it introduced into evidence the recorded interviews of Person A, Person B and [REDACTED]. Respondent testified on his own behalf. A stenographic transcript of the trial record is available for the Police Commissioner's review.

After evaluating the testimony and evidence presented at the hearing, and assessing the credibility of the witness and hearsay declarations, this tribunal finds that there was insufficient evidence to support a finding that Respondent wrongfully used

force against Person A. Accordingly, Respondent is found not guilty of the charge set forth above.

FINDINGS AND ANALYSIS

The following is a summary of the relevant facts that are undisputed. At approximately 1520 hours on September 18, 2013, Person A was walking in the vicinity of Bay Street and Clinton Street in front of the Western Beef Supermarket in Staten Island. Person A had missed the bus and was walking quickly toward the ferry to attend a program run by Cases in Manhattan. As he walked, he looked over his shoulder to ascertain if another bus was approaching that could take him to the terminal. As he did so, he noticed the occupants of a car looking at him “funny” as if he “had something.” (CCRB Exs. 1A, 1B)

Respondent was assigned to the Anti-Crime Unit. That day he was working a plain clothes anti-crime assignment within the confines of the 120 Precinct. As he drove in an unmarked police vehicle down Bay Street with Sergeant Saminath, he saw Person A and recognized him as a burglary recidivist with an outstanding icard and/or wanted poster.¹ They pulled up next to Person A to verify his identity and ask about his destination. Convinced that this was the person wanted for burglary, Respondent exited his vehicle to arrest Person A protested the arrest and an altercation ensued. With the assistance of another officer who responded to the scene in a radio motor patrol car, Respondent used force to handcuff Person A and effectuate the arrest. Person A was pressed face forward on the rear of the unmarked police vehicle and searched. Person A had an injury on his face, and notations were made in a Medical Treatment of Prisoner

¹ Although in dispute, it was Respondent's testimony that the arrest was based on information he had seen an open icard or wanted poster at the precinct indicating that there was probable cause to arrest Person A for burglary. The lawfulness of the stop and arrest, however, is not at issue in this case.

Form documenting a “bruise to lower lip.” Respondent confirmed that he was arrested on a burglary charge. He was also charged with resisting arrest. (Tr. 23-27, 50-51, 60, 65; CCRB Exs. 1A, 1B, 5)

The sole issue in this case is whether Respondent wrongfully used force against Person A by slamming his head against a vehicle without police necessity. At trial, Respondent denied the allegations. According to Respondent, he asked Person A to cooperate with his arrest. Person A protested, physically resisted and shoved him. As a result, Respondent used force to handcuff Person A by using his body weight to hold him against the car. Respondent denies slamming Person A’s head into the car although he acknowledges that Person A had a bruised lower lip at the precinct. (Tr. 24-32 40, 51-55; CCRB Ex. 4) For the reasons set forth herein, this tribunal credits Respondent’s testimony and finds that the preponderance of the credible evidence failed to prove that he engaged in the charged misconduct.

CCRB sought to prove its case on the basis of three hearsay statements. Specifically, CCRB introduced into evidence the transcript and recordings of Person A’s CCRB interview and the telephone interviews of two bystanders, Person B and Person C. Although hearsay is admissible in an administrative tribunal, it must be sufficiently probative and reliable to be accorded probative weight. *Ayala v. Ward*, 170 A.D.2d 235, 565 N.Y.S.2d 114 (1st Dep’t 1991), *lv. to app. den.*, 78 N.Y.2d 851, 573 N.Y.S.2d 69 (1991). Where, as here, the hearsay evidence is controverted, a fact finder must very carefully scrutinize the nature and reliability of the out-of-court statement.

Person A related the following to the CCRB investigator on October 24, 2013. When the unmarked police vehicle pulled up next to him, the passenger told him to stop.

He answered the officer's questions, identified himself and told them he was rushing to catch the ferry to attend a program in Manhattan. According to Person A, "the undercover smiled" and said "I know you." Person A told the officers that they did not know him and that he had to continue on his way or he would be late. The driver, later identified by CCRB as Respondent, became "mad," exited the car, took out his handcuffs and "threw" him onto the back of the car. Person A asked, "What are you all doing?" but was told to "shut the fuck up." According to Person A, when he raised his head to speak, Respondent "started smashing [his] head into the glass" and injured his face. Respondent handcuffed Person A, searched him and placed him under arrest. During the CCRB interview, Person A stated that even though he did not want to go with the police, he did not resist. He added, however, that Respondent was "hemming me up like grabbing me up like holding me like moving me from side to side. Cause I didn't really want to go nowhere. Like yo, why am I going?" He objected that the handcuffs were too tight and claimed that they injured his arm and middle finger. Although Person A insisted that he was "doing nothing" and that they were "mistaking [him] for somebody," he later acknowledged that he was arrested on a burglary charge. (CCRB Ex. 1B, pgs. 4-9, 13-18, 27, 43, 50-51)

Courts rely upon a number of factors to assess hearsay, including the identity of the hearsay declarant, the availability of the declarant to testify, declarant's personal knowledge of the facts, the independence or bias of the declarant, the detail and range of the hearsay, the degree to which it is corroborated and the centrality of the hearsay evidence to the agency's case. *See Ayala v. Ward*, *Calhoun v. Bailar*, 626 F.2d 145 (9th

Cir. 1980), *cert. den.*, 452 U.S. 906, 101 S.Ct. 3033 (1981); *Richardson v. Perales*, 402 U.S. 389, 91 S.Ct. 1420 (1971).

Although the complaining witness did not appear, the tribunal understands that CCRB made a concerted attempt to produce him for trial. Given the complications of his present incarceration, CCRB's inability to control his appearance was not weighed against the evidence. Nonetheless, this is exactly the type of case where the test of cross-examination is necessary to assess details, motives and ultimately, the reliability of the complaining witness account.

There are a number of other factors that do weigh against the reliability of Person A's hearsay declaration. First, his out-of-court statement is largely determinative of the outcome. It is axiomatic that the more central and important the hearsay is to a case, the more serious the question of basic fairness and the more critically it should be assessed. *In re Matter of 125 Bar Corp. v. State Liquor Authority of the State of NY*, 24 N.Y.2d 174 (1969). This is particularly true where, as here, the tribunal is presented with an unsworn, oral statement from a complainant who undoubtedly has detailed knowledge of the event but who also has an inherent interest in the outcome of the case. These factors alone could diminish the probative value of Person A's out-of-court statement.

The dispositive consideration here is that Person A's account was not sufficiently corroborated by eye witness statements. Person B and Person C were walking on Bay Street when they saw Respondent arrest Person A. Minutes after the event, Person B called the CCRB to file a complaint on behalf of an "unidentified individual" who was later identified by CCRB as Person A. Person B did not know Person A but called because he believed the police had abused their authority. Person B reported seeing an unmarked

police vehicle pull up to a young man who was walking in front of the Western Beef Supermarket on Bay Street. As the officers approached and grabbed Person A he yelled, "You can't search me. You guys can't touch me. What are you guys doing?" Person B specifically recalled Person A yelling, "Why are you being an asshole?" According to Person B, the officer responded, "I'm an asshole?" and "smacked" Person A's face. Person B added that, "then they started to manhandle him and throw him up against the car because obviously after the kid got hurt he tried to defend himself. Then they handcuffed him..." and searched him. Another officer responded to the scene in a radio motor patrol car. When they realized Person B was videotaping the encounter an officer said that Person A had bit him. Person B said he had captured the entire incident on his iPhone. (CCRB Exs. 2A, 2B)

That a bystander, with no interest in the outcome of this case, made a contemporaneous report to the CCRB is indicia of reliability. He was alarmed because he had no knowledge of the outstanding icard and from his perspective the police had arrested a young man for just walking down the street. This tribunal cannot ignore, however, that during his first phone call to the CCRB Person B never reported that Respondent slammed Person A's head against the glass while handcuffed. Instead, he focused on Person A being slapped by Respondent before being handcuffed -- an allegation never mentioned by Person A during his CCRB interview. It is important to also note that Person B observed Person A trying to "defend himself" and only "then" was allegedly "manhandled" by the police and thrown against the car. Accordingly, I find that this statement fails to corroborate Respondent's hearsay account of the alleged misconduct.

Two months later, on November 18, 2013, CCRB called witness Person C who was traveling with Person B on the Staten Island ferry. Person C reported seeing “a bunch of cops jump... on a young black male and he was standing there doing nothing.”

According to Person C, it was the police who first stated, “What are you doing asshole” and Person A who replied, “don’t call me an asshole.” The police then pushed Person A against the car even though he was not resisting. When the officers realized that bystanders were watching, an officer removed his hand from Person A’s back pocket and falsely claimed that he had been bitten. Person C informed the investigator that his friend had a video of the encounter that would be emailed to CCRB.² Person C then described incidents in which he was personally manhandled by the police and forced to sign a statement. At no time during his first account did Person C corroborate Person A’s claim that his face was slammed against a vehicle. (CCRB Ex. 2C1)

In Person C’s presence, Person B returned to the phone and contradicted his first statement by agreeing with Person C that the police called Person A an “asshole” first. He again stated that the police “just open hand slapped him,” but this time he added that the slap caused Person A to “[drop] to one knee and they pulled him up.” During this second statement he added for the first time that the officers also “slammed” Person A’s face into the back of the vehicle. (CCRB Ex. 2C1)

After hearing Person B make his statement, Person C returns to the phone again and for the first time adds that an officer gave Person A an “open handed slap across the face” and “slammed” his head on the car. He then tells CCRB about a second encounter he had with the police where he was arrested for possession of “pqt.”

² Despite numerous references to the existence of a video by both bystanders, none was introduced into evidence.

Despite the good intentions of these two bystanders, their hearsay statements were so lacking in reliability that they cannot be used to sustain the charge against Respondent. There are several reasons why. First, during their original statements to the CCRB neither Person B nor Person C corroborated Person A's story that Respondent slammed his head against the car as charged. Second, Person B and Person C were together as they talked to the CCRB investigator. In fact, although difficult to hear because of ambient noise, there are points during the conversations when one is speaking about this incident as the other talks to the CCRB investigator. Perhaps due to this influence, their versions of events seem to shift to conform to the other's statement even when their first accounts contradicted each other on salient points. For example, they originally differed on who used the term "asshole" first but by the end of the conversation both agreed that the police used the term first. Third, their shifting accounts, made in each other's presence, leads this tribunal to conclude that their eventual assertion that Person A's head was "slammed" could not be relied upon. Although their original statements did not include a description of the charged misconduct, as they talked to the CCRB together and heard and commented on their statements, their accounts seemed to evolve to include a passing reference to Person A's head being "slammed." Fourth, without benefit of cross examination, this tribunal cannot assess the biases and motivations of the witnesses. This would have been particularly important in this case because Person A spent considerable time during his phone interview discussing his own negative experiences with the police including several arrests. Thus, I find that there is insufficient evidence to corroborate Person A's claim that Respondent slammed his head against a vehicle without police necessity.

In dismissing the charge, I acknowledge that force was used and that Person A did have at least a bruise on his face. (CCRB Exs. 3, 4) The preponderance of the evidence, however, established that Person A did resist arrest. This tribunal credits Respondent's testimony on this point. In addition, parts of Person A and Person B's statements allude to his physical resistance. Even after denying that he resisted arrest, Person A himself told the CCRB investigator that Respondent was "hemming me up like grabbing me up like holding me like moving me from side to side. *Cause I didn't really want to go nowhere. Like yo, why am I going?*" In addition, Person B implied that [REDACTED] resisted when "*he tried to defend himself*" after allegedly being slapped in the face. In sum, CCRB did not meet its burden of proving that the force used was without police necessity.

In light of the fact that the hearsay evidence in this case was seriously controverted and not credibly corroborated, it did not amount to the substantial evidence necessary to support the charge. Accordingly, the charge is dismissed.

Respectfully submitted,



Rosemarie Maldonado
Deputy Commissioner Trials

APPROVED

MAY 27 2015

WILLIAM J. BRATTON
POLICE COMMISSIONER